

13-0217

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ROGER W. HURLBERT, and
SAGE INFORMATION SERVICES,

UCF

Plaintiffs,

v.

CIVIL ACTION NO. 11-C-1762
Judge Charles E. King, Jr.

CRAIG A. GRIFFITH, Tax Commissioner,
West Virginia State Tax Department,

Defendant,

and

PHYLLIS GATSON, KANAWHA COUNTY ASSESSOR,

Intervenor.

**ORDER GRANTING DEFENDANT'S AND INTERVENOR'S MOTIONS FOR
SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR
INJUNCTION, DECLARATORY
JUDGMENT AND/OR SUMMARY JUDGMENT**

On September 24, 2012, came Plaintiffs, Roger W. Hurlbert and Sage Information Services (referred to hereafter collectively as "Sage"), by counsel, Sean McGinley; Defendant, Craig A. Griffith, Tax Commissioner ("the Tax Commissioner"), by counsel, Charli Fulton; and Intervenor, Kanawha County Assessor Phyllis Gatson ("the Kanawha County Assessor"), by counsel, Karen Tracy McElhinny and Stephen Sluss; and presented oral argument on the dispositive motions previously filed by all parties.

Plaintiffs sued the State Tax Commissioner to obtain property tax documents under the West Virginia Freedom of Information Act (“WVFOIA”). Thereafter, the Kanawha County Assessor intervened. This matter is before the Court on motions for summary judgment filed by Sage, the Tax Commissioner, and the Kanawha County Assessor.

After considering the motions and memoranda filed by all parties, oral argument of counsel, and the applicable case law and statutes, this Court does hereby issue the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On May 16, 2011, Plaintiffs Roger W. Hurlbert and Sage Information Services wrote a Freedom of Information Act letter asking the West Virginia Tax Department to provide “a copy, on CD or similar electronic media” of two types of West Virginia property tax records: “the assessment files” and “the CAMA files” “for all real property in all counties” in West Virginia. Amended Compl. Ex. A. Sage asked the Department to provide the information in “a database format capable of being sorted and manipulated” and to include “keys to any coded items.” *Id.*

2. The assessment records requested by Sage are a compilation of the contents of the land books for all 55 counties in West Virginia. The land book is an inventory of all real estate in a county, showing an assessed value for each property. Affidavit of Faith C. Dangerfield at ¶ 4; W. Va. Code § 11-3-2. The land book contains the tax ticket number, taxpayer name, map, parcel, deed book and page, property description, assessed value, and

tax for each parcel of property. Affidavit of Faith C. Dangerfield at ¶ 7; Ex. 1-C. Copies of the land book for each county are available for public inspection in the county assessor's office and in the county record room.

3. The Tax Department granted Sage's FOIA request for "the assessment files . . . for all real property in all counties" on May 27, 2011. Amended Compl. Ex. B. General Counsel for the Department informed Sage that the Department would provide CDs containing all assessment records once the Department received a check in the amount of \$9.23 to cover the cost of providing the information. Amended Compl. Ex. B. However, Sage declined to send payment for the assessment records and therefore did not receive them.

4. The term "CAMA" is an acronym for computer-assisted mass appraisal.

5. In West Virginia, county assessors do computer-assisted mass appraisal using a statewide electronic data processing system network, Integrated Assessment System (IAS). Sage's FOIA request for "the CAMA files for all real property in all counties" thus seeks all information contained on the statewide IAS computer network for all 55 counties in West Virginia.

6. The Tax Department denied Sage's FOIA request for "the CAMA files for all real property in all counties," stating that the Tax Department is not the custodian of those records under W. Va. Code § 29B-1-3(2). Amended Compl. Ex. B.

7. Sage filed the instant civil action against the Tax Commissioner seeking disclosure of “all ‘CAMA files for all real property in all counties’” in West Virginia. Amended Compl., ¶ 1.

8. Field appraisers employed by the assessors’ offices visit taxpayer properties at least once every three years. Affidavit of Faith C. Dangerfield at ¶ 11. During these visits, they determine when the house was built, the type of construction, how many rooms of various types, and various other features of the property. Sometimes the field representatives prepare a sketch of the outside of the property. Owners or builders sometimes provide photographs of the inside or outside of the property. Affidavit of Stephen Duffield at ¶ 2.

9. The field appraisers measure the exterior of the taxpayer’s home, outbuildings, and other structures or commercial building. Affidavit of Faith C. Dangerfield at ¶ 11.a. They also draw a sketch of the taxpayer’s home, outbuildings, and other structures, labeling the dimensions of these structures on the sketch. *Id.* at ¶ 11.b.; Affidavit of Stephen Duffield at ¶2.

10. They also note whether the structure is vacant, a dwelling, or other; the number of stories; the type of exterior walls (frame, stucco, brick, stone, asbestos, aluminum, or vinyl siding); the style (conventional, ranch, modern, bi-level, tri-level, etc.); the date the structure was built and the year of any subsequent remodeling; living accommodations (total number of rooms, number of bedrooms, number of family rooms);

plumbing (number of full baths, number of half baths, number of additional fixtures, and total number of fixtures); basement (none, crawl, part). Affidavit of Faith C. Dangerfield at ¶ 11.c. The appraisers also note the presence or absence of security systems and whether the homeowner was present during the visit. Affidavit of Stephen Duffield at ¶ 3. The Kanawha County Assessor's Office also includes in this computerized record the longitude and latitude of each property in Kanawha County. Affidavit of Stephen Duffield at ¶ 3.

11. The field representatives use these property visits and interviews to collect data that is input into the computerized system (also known as CAMA data) and used for valuation. Affidavit of Stephen Duffield at ¶ 3.

12. Different field representatives record private information in different fields, *i.e.*, one representative might record data about a security system in one field whereas another might record somewhere else. Affidavit of Stephen Duffield at ¶ 4.

13. Residents of Kanawha County are required to file tax returns with the Kanawha County Assessor each year that include information about all real estate they own in Kanawha County and all improvements or changes to that property valued at \$1,000.00 or more in the past twelve months. West Virginia Code § §11-3-3, 11-3-3a, 11-3-10. Information submitted on these tax returns is also included in the CAMA data. The Kanawha County Assessor considers this information to be confidential tax return

information that cannot be disclosed pursuant to West Virginia Code §11-1A-23(a).
Affidavit of Stephen Duffield at ¶ 5. .

14. Residents of Kanawha County sometimes raise privacy concerns to the Kanawha County Assessor and representatives from her office. Some citizens indicate that they are willing to provide the requested information to the Kanawha County Assessor, but they specifically request that the information not be disclosed to anyone else.
Affidavit of Stephen Duffield at ¶ 6; Affidavit of Noelle A. Starek.

15. The Kanawha County Assessor's CAMA data for commercial properties contain profit and loss statements, which the Kanawha County Assessor uses to value the properties under the income approach. Under that approach, the value of the property is based on the type of business (*e.g.*, retail, apartment building, doctor's office, fast food restaurant, *etc.*) and the amount of income it produces. Affidavit of Stephen Duffield, at ¶ 8.

16. In correspondence requesting such information from taxpayers, the Kanawha County Assessor has assured taxpayers that they will keep the information "strictly confidential" under West Virginia Code §11-1A-23(a). Intervenor's Supplementary Ex. 5 Profit and Loss letter.

17. The Kanawha County Assessor's CAMA data for commercial properties also often includes other detailed information such as photographs, blueprints, and other

documentation that may be used by competitors of businesses to gain a commercial advantage. Affidavit of Stephen Duffield at ¶ 9.

18. In some circumstances, the Kanawha County Assessor's office collects information such as the specific longitude and latitude of commercial properties such as chemical plants, photographs of said plants, blueprints of said plants, etc., that could constitute trade secrets that are exempt under West Virginia Code §29B-1-54(a)(1) and/or which could raise potential homeland security risks. Affidavit of Stephen Duffield at ¶ 12.

19. The Tax Department, with some information provided by County Assessors, appraises industrial property and inputs data in industrial properties into the IAS system. Affidavit of Faith C. Dangerfield at ¶¶ 3.b, 17.

20. Some industrial property data in the IAS system raises privacy and public safety concerns. Affidavit of Faith C. Dangerfield at ¶ 19. For example, some large chemical plants name buildings according to what chemical is manufactured inside the building, and, if a building is named for a dangerous chemical – *e.g.*, chlorine or methyl isocyanate (MIC) – even disclosing the name of the building poses public safety issues. *Id.* at ¶ 19.

21. Industrial property owners provide detailed information to the Tax Department with the expectation that it will be used for tax assessment purposes only but otherwise be held private and confidential. *Id.* at ¶ 19.

22. West Virginia has a statewide electronic data processing network, Integrated Assessment System (IAS), which was established for the purpose of facilitating administration of the ad valorem property tax on real and personal property through timely sharing of property tax information among the county tax assessors and the Tax Department. Affidavit of Kris A. Pinkerman at ¶ 3.

23. The Tax Commissioner is required to establish and maintain the IAS system, and the county assessors are required to store their property tax information on the system. W. Va. Code §§ 11-1A-21(a), -(e).

24. Redacting the CAMA data in IAS so as to withhold information deemed confidential by the county assessors would be impracticable because of the great difficulty and expense. Affidavit of Kris A. Pinkerman at ¶ 17.

25. Redacting information would require changes to be made to IAS by a computer programmer. Affidavit of Kris A. Pinkerman at ¶ 17.a. Although the Tax Department has computer programmers on staff, they would have to be taken away from other work to perform any programming changes for redaction purposes. Affidavit of Kris A. Pinkerman at ¶ 17.b. Making even simple changes to IAS sometimes causes problems with its operation. Affidavit of Kris A. Pinkerman at ¶ 17.c. Making the complex changes that would be required if more than a few items were redacted would present a risk of losing or corrupting the data stored on the IAS statewide network. Affidavit of Kris A. Pinkerman at ¶ 17.d.

26. Because of the risk that data might be corrupted or lost, the Tax Department would likely have to contract with Tyler Technologies, the distributor of the IAS program, for any significant redactions. Affidavit of Kris A. Pinkerman at ¶ 17.e. Tyler Technologies charges \$203 per hour for such services. Affidavit of Kris A. Pinkerman at ¶ 17.e.

27. Because the county assessors have varying views as to which information stored in the IAS network is confidential, it is conceivable that there would have to be 55 separate programs written to accommodate these views. Affidavit of Kris A. Pinkerman at ¶ 17.f.

28. Neither Roger W. Hurlbert nor Sage Information Services owns any real or personal property in West Virginia. Affidavit of Shawn O. Farley.

29. Neither Hurlbert or Sage holds a current business registration certificate from the Tax Department, which is required to engage in business in West Virginia. Affidavit of Kimberly D. Lowers.

30. Neither holds, or has held, a real estate license from the West Virginia Real Estate Commission. Affidavit of Kevin G. Hypes.

31. Neither holds, or has held, a real estate appraiser license from the West Virginia Real Estate Licensing & Certification Board. Affidavit of Sandy Kerns.

32. Roger Hurlbert served as secretary of Real Estate Information Providers Association (REIPA), an organization whose members “provide store houses of data

products that consist of refined data collected from public records of home buyers, mortgage holders, selling prices, plat listings, and the like.” Letter from REIPA President Linda Wendt to the FTC (Mar. 31, 2000), available at <http://www.ftc.gov/privacy/glbact/comments/wendtlinda.pdf> at 1 (last accessed June 12, 2012).

33. In a FOIA lawsuit that he brought in Virginia seeking tax assessment data, Mr. Hurlbert claimed that the Henrico County assessor’s office’s denial of data prevented him from practicing his trade, which he defined as “obtaining records related to real property on behalf of clients, in Virginia.” *McBurney v. Young*, 667 F.3d 454, 463 (4th Cir. 2012). The Fourth Circuit described Mr. Hurlbert as “a citizen of California and the sole proprietor of Sage Information Services” and his business as “requesting real estate tax assessment records for his clients from state agencies across the United States, including Virginia.” *Id.* at 460.

CONCLUSIONS OF LAW

34. The West Virginia Legislature has exempted the following items from the Freedom of Information Act’s disclosure requirements: “Information of a personal nature such as that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance....” West Virginia Code §29B-1-4(a)(2).

35. “The primary purpose of the invasion of privacy exemption to the Freedom of Information Act . . . is to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information.” Syl. Pt. 6, Hechler v. Casey, 175 W.Va. 434, 434, 333 S.E.2d 799, 799 (1985); Syl. Pt. 2, Manns v. City of Charleston Police Dep’t, 209 W.Va. 620, 620, 550 S.E.2d 598, 598 (2001).

36. The CAMA data collected by the assessors contains substantial “information of a personal nature” as that phrase is used in West Virginia Code §29B-1-4(a)(2) because it contains information such as information concerning property owners’ nursing home stays, disabilities, photographs and drawings of the inside and outside of private citizens’ homes and businesses, information about the construction materials used in private homes and businesses, blueprints, profit and loss statements for commercial properties, and even information about whether the property owner is home during the day, all of which this Court finds is information which could result in a substantial invasion of privacy if it was disclosed. See, Metropolitan Regional Information Systems v. Bordier, (hereinafter “MRIS”), Civil Action No. 99-C-20, Circuit Court of Jefferson County (Final Order entered April 10, 2000) (finding that information about the taxpayers’ home, curtileges, and businesses is “information of a personal nature”).

37. In deciding whether the public disclosure of information of a personal nature under W.Va. Code §29B-1-4(2)(1980) would constitute an unreasonable invasion of privacy, this Court looks to five factors:

1. Whether disclosure would result in a substantial invasion of privacy, and, if so, how serious.
2. The extent or value of the public interest, and the purpose or object of the individuals seeking disclosure.
3. Whether the information is available from other sources.
4. Whether the information was given with an expectation of confidentiality.
5. Whether it is possible to mould relief so as to limit the invasion of individual privacy.

Syl. Pt. 2, Child Protection Group, 177 W.Va. at 29, 350 S.E.2d at 541; Syl. Pt. 4, Manns, 209 W.Va. at 620, 550 S.E.2d at 598.

38. The CAMA data includes significant personal information including photographs and drawings of the inside and outside of private citizens' homes and businesses, information about the construction materials used in private homes and businesses, blueprints, profit and loss statements for commercial properties, and even information about whether the property owner is home during the day. (Affidavit of Stephen Duffield) Under the first prong of the five-part test, the CAMA data, if disclosed, would result in a substantial invasion of privacy. See, MRIS at 14 (finding based upon testimony from Jefferson County property owners that disclosure of their CAMA data would be a substantial invasion of their privacy); *Final Report: State of New Jersey Privacy Study Comm'n*, at 7-8 (December 2004), available at <http://www.nj.gov/privacy>, (finding that the disclosure of data in a format "capable of being sorted and manipulated" creates the potential for abuses of information that are different from the same information being kept in traditional formats.)

39. In addition, Kanawha County requires the owners of commercial property to provide profit and loss statements, which the Assessor uses to value the property using the income approach. Under this approach, the value of the property is based on the type of business at the location (e.g., restaurant, physician's office, retail store, apartment building, etc.) and the amount of income it produces. Affidavit of Stephen Duffield, ¶ 8. In the letter requesting the information, the Assessor assures the property owner that she considers the information "property tax information" under W. Va. Code § 11-1A-23(a) and that she will hold it "strictly confidential." Ex. 4, attached to Tax Commissioner's Memorandum of Law Opposing Plaintiffs' Motion for Injunction, Declaratory Judgment, and/or Summary Judgment.

40. Some information contained in the CAMA files for industrial properties raises privacy (and safety) concerns because buildings are named for dangerous chemicals that are manufactured therein. As to such properties, the taxpayers provide information to the Tax Department with the expectation that it will be used for tax assessment purposes only but otherwise be held confidential. Affidavit of Faith C. Dangerfield at ¶ 19.

41. In MRIS, witnesses testified they would consider disclosure of the detailed CAMA data to be a substantial invasion of privacy. MRIS at 14. Witnesses also testified that disclosure could cause harm in the form of "uninvited solicitations from vendors of products and services who would through disclosure learn of the existence or non-existence of finished basement, an old house in need of remodeling, the lack of a

garage or family room, the lack of air conditioning, the lack of second bathroom, the lack of a paved driveway, the lack of a security system or some other thing.” *Id.* at 14-15. Based on this and other testimony, the Jefferson Circuit Court concluded that the invasion of privacy was substantial. *Id.* at 15.

42. In the instant case, the invasion of privacy is substantial for all the same reasons set forth in MRIS and because it would allow business competitors access to sensitive profit and loss statements, would disclose the location of dangerous chemicals, and would potentially allow burglars to know which residential properties have no one home during the day.

43. With respect to the second prong, the extent or value of the public interest, and the purpose of Mr. Hurlbert and his company in requesting, Plaintiffs failed to produce any information that would inform this Court as to Plaintiffs’ purpose(s) in requesting the data.

44. “If the information is sought to provide something which would be useful to the public, then the courts will weigh this favorably....where a misuse of information may result, the courts are wary of ordering disclosure.” Child Protection Group, 177 W.Va. at 33, 350 S.E.2d at 544 (internal citations omitted).

45. In the case at bar, Plaintiffs have failed to provide this Court with evidence that they have a substantive interest that would justify their need for the records.

46. With respect to the third prong of the test, whether the information is available from other sources, this Court finds that any information contained in the CAMA data that does not implicate privacy concerns is available from an alternative source, the assessment files, which the Defendant Tax Department offered to produce to Plaintiffs.

47. “Where an individual fails to present, by clear and convincing evidence, a legitimate reason sufficient to overcome the exemption from disclosure found in W.Va. Code §29B-1-4(2)(1986), and where an adequate source of information is already available, the records will not be released.” Syl. Pt. 3, Robinson, 180 W.Va. at 26, 375 S.E.2d at 204.

48. Here, the Tax Department offered to produce the assessment files for all property in all counties in West Virginia to Plaintiffs on a CD for the cost of \$9.23. (Amended Complaint, at Exhibit B) This would provide Plaintiffs with the relevant non-exempt information including tax maps and parcel numbers, assessment tables, taxpayer names, legal description, deed and page. (Affidavit of Faith Dangerfield, at ¶ 7)

49. With respect to the fourth prong of the test, whether the information was given with an expectation of confidentiality, this Court also finds that all evidence presented demonstrates that taxpayers do give this information with an expectation of confidentiality. Affidavit of Steven Duffield at pp. 2-3; Affidavit of Noelle A. Starek.

50. With respect to the fifth prong of the test, whether it is possible to mould relief so as to limit the invasion of individual privacy, the CAMA data is gathered and

stored in such a way with private information being contained in different fields that it is extremely impractical and prohibitively expensive to redact such data. Affidavit of Stephen Duffield at ¶ 4.

51. Additionally, it would be extremely expensive and impracticable for the Tax Department to hire a computer programmer to electronically redact all information. Affidavit of Kris A. Pinkerman at ¶ 17. The Tax Department would have to pay computer programmers to create separate programs to redact the specific information that each of the 55 county assessors deemed confidential. The price of such services at the current rate – \$203 per hour – would be substantial. *Id.*

52. In MRIS, testimony established that there was no practicable way to redact the CAMA information regarding burglar alarms because it was recorded in several places on the property record cards and the resulting computerized records. MRIS at 17-18. The court concluded that there was no way to mould relief without the invasion of privacy because the exempt and nonexempt information was inextricably linked. *Id.*

53. This Court finds that the same problem exists in the case at bar. As such, this Court finds as a matter of law that it is not possible to mould relief so as to limit the invasion of privacy.

54. Thus, on balance after examining all five factors of the Cline test, this Court holds as a matter of law that the privacy exemption applies and the requested CAMA data

is accordingly exempt from the disclosure provisions of West Virginia FOIA, pursuant to West Virginia Code §29B-1-4(a)(2).

55. West Virginia Code §11-1A-23(a) specifies that certain tax return information must be kept confidential:

Property tax returns and return information. . . shall be confidential and except as authorized in this section, no officer or employee of the State Tax Department, county assessors...shall disclose any return or return information obtained by him or her...in any manner in connection with his or her service as an officer, member or employee: Provided, That nothing herein shall make confidential the itemized description of the property listed, in order to ascertain that all property subject to assessment has been subjected to appraisal: Provided, however, **That the commissioner and the assessors shall withhold from public disclosure the specific description of burglar alarms and other similar security systems held by any person, stocks, bonds, and other personal property held by a natural person, except motor vehicles and other tangible property utilized publicly, and shall withhold from public disclosure information claimed by any taxpayer to constitute a trade secret or confidential patent information**" (emphasis added)

56. This Court finds that the CAMA data requested by the Plaintiffs contains information about burglar alarms and similar security systems, and such data is recorded in different fields, making redaction difficult, if not impossible. Affidavit of Stephen Duffield, at ¶ 4. Additionally, some of the information contained in the CAMA data is obtained by the Kanawha County Assessor from information submitted by property owners on their tax returns. Affidavit of Stephen Duffield at ¶ 5.

57. Thus, this Court holds as a matter of law that the requested CAMA data contains confidential tax return information that is exempt from FOIA disclosure pursuant to West Virginia Code §29B-1-4(a)(5).

58. Additionally, this Court finds that some of the data collected by the Kanawha County Assessor and stored in the CAMA system contains trades secrets and/or homeland security risk associated information. (Affidavit of Stephen Duffield at ¶ 12) As such, this data is also exempt from FOIA under West Virginia Code §29B-1-54(a)(1).

59. This Court notes that Defendant Tax Commissioner also raised the issue of whether the Tax Commissioner is the custodian of the CAMA files. However, having decided that the requested records are exempt from FOIA's disclosure provisions, this Court finds that the records custodian issue is moot and does not address that issue.

Therefore, this Court does hereby **GRANT** the Tax Commissioner's Motion for Summary Judgment, **GRANT** Intervenor's Motion for Summary Judgment and finds as a matter of law that the CAMA data records requested by Plaintiffs are exempt from the WV FOIA disclosure requirements pursuant to West Virginia Code §29B-1-4(a)(2) because they include information of a personal nature and West Virginia Code § 29B-1-4(a)(5) and West Virginia Code §11-1A-23 because they include tax return information and/or the specific description of burglar alarms and other similar security systems. This Court also finds that the exempt and nonexempt records are so intertwined that segregation of the nonexempt data would be overly costly and burdensome and redaction is not required.

Furthermore, this Court hereby **DENIES** Plaintiffs' Motion for Injunction, Declaratory and/or Summary Judgment, finding as a matter of law that Plaintiffs are not entitled to the requested CAMA data.

The Court notes the objection and exception of the party or parties aggrieved by this Order.

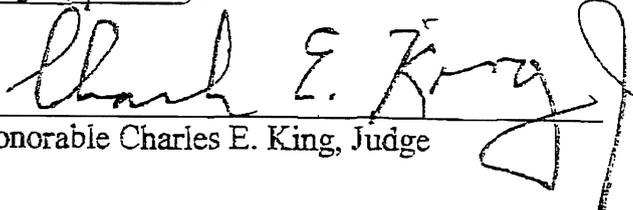
The Clerk of the Court is hereby directed to **DISMISS** this case and **REMOVE** it from the active docket of this Court. The Clerk of the Court is also directed to forward a certified copy of this Order to all counsel of record as follows:

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Enter: 10TH day of Jan., 2013.


Honorable Charles E. King, Judge